UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/Sub.2/1992/NGO/9
13 August 1992

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Forty-fourth session
Agenda item 4

REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN CONCERNED

Written statement submitted by the International Commission of Jurists, a non-governmental organization in consultative status (category II)

The Secretary-General has received the following communication, which is circulated in accordance with Economic and Social Council resolution 1296 (XLIV).

[12 August 1992]

STUDY CONCERNING THE RIGHT OF RESTITUTION, COMPENSATION AND REHABILITATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS:

THE CASES OF CHILE, ARGENTINA, AND URUGUAY

Introduction

1. Chile, Argentina and Uruguay have all adopted laws which supposedly aid in the national reconciliation process of making peace among the varying factions within each State. Chile's new law grants compensation to over 2,000 human rights victims. Argentina's new law grants compensation to those

GE.92-13176/5013H (E)

victims of human rights violations who have been administratively detained or detained by military tribunals. Uruguay has adopted no law to compensate the victims of human rights violations. In fact, Uruguay and Argentina have both granted amnesty to the perpetrators of human rights violations under laws which the Inter-American Commission of Human Rights has found to violate international law.

2. Regarding remedying human rights violations, the same international law criteria apply to all three of these countries.

The law of the United Nations

3. The views of the United Nations Human Rights Committee have established the following obligations of the State:

(a) To investigate the facts;

(b) To bring to justice persons found to be responsible;

(c) To extend to the victim(s), treatment in accordance with the provisions of the Covenant;

(d) To provide medical care to the victim(s);

(e) To pay compensation to the victim(s) or to his/her family.

4. Regarding compensation, the Human Rights Committee uses various formulations which include not only physical injury or damage, but also mental injury or damage. (See final decisions: No. 30/1978; No. 45/1979; No. 84/1981; No. 107/1981; No. 110/1981; No. 146/1983; No. 148/1983.)

5. In addition, though not a conventional document, the laws of these countries should also be evaluated in light of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The Declaration establishes (para. 11) that:

Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted...

The law of the Inter-American system

6. The pertinent sections of the American Convention on Human Rights are contained in articles 1,8 and 25. Article 1.1 obliges each State to protect the rights and liberties recognized in the Convention. Article 8.1 (judicial guarantees) establishes that each person has the right to access to a court to defend himself/herself and for determining his/her rights and obligations. Article 25.1 (right to judicial protection) establishes that all people have the right to effective recourse before a court for acts violating fundamental rights. Article 25.2 establishes that each State party guarantees the competent review by the legal system to pronounce on the rights of all persons seeking such recourse.

The Inter-American Court of Human Rights

7. The Inter-American Court has clarified the member States's obligations under the American Convention on Human Rights through its case law. The case often cited is the Honduran case of Velásquez Rodríguez. Here the Court stated that as a consequence of article 1 of the Convention:

> [t]he States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violations. 1/

Additionally, the Court ruled:

> [t]he State has a legal duty to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim compensation. 2/

8. Regarding the compensation, the Court ruled that reparation "includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm."

The Inter-American Commission of Human Rights

9. The Inter-American Commission concluded in October 1991 that the laws of both Argentina and Uruguay, which grant impunity to human rights violators (Argentina, Obediencia Debida and Punto Final and Uruguay, Ley de Caducidad de la Pretención Punitiva del Estado) violate the right to justice under both the Convention and the American Declaration.

10. In sum, according to international law, the States are obliged to investigate human rights violations, to carry out justice by prosecuting and appropriately punishing the perpetrators of the violation and to provide just compensation to the victims.

11. De jure and de facto impunity of public officials prevent criminal proceedings which are essential to reveal "the truth". Such criminal proceedings are also necessary for preventing and deterring future violations. Measures of clemency, nevertheless, may at times be necessary. At the very least, however, such measures should only take effect to avoid implementation of sentences already imposed.

I. CHILE

12. On 31 January 1992 the Chilean Government promulgated law No. 19.123, creating the National Corporation of Reparation and Reconciliation to carry out the law's grant of compensation. The compensation covers certain victims of human rights violations and political violence occurring in Chile between 11 September 1973 and 11 March 1990. The law declares that knowledge of what happened to persons who have "disappeared" is an inalienable right of the

families of the victims and of Chilean society. Moreover, the law's stated objectives include promoting the reparation of moral damage by granting social and legal assistance to the victims; promoting the pending actions to determine the circumstances of a victim's death of disappearance; continuing the objectives of the National Commission of Truth and Reconciliation 3/ in cases where the Commission was unable to complete an investigation.

13. The law provides for the formation of the Corporation, financed by the State.

14. The new law establishes a monthly pension, and a lump sum equivalent to 12 monthly pensions, for the families of human rights victims who have been killed or are presumed to have been killed. Those eligible for compensation include relatives of persons recognized as victims by the National Commission of Truth and Reconciliation, as well as those whom the Corporation officially recognizes as such.

15. The Commission's report found, by consensus, that the State bore responsibility for gross, systematic violations of human rights. The report blamed various State offices but made no pronouncements of those specifically involved in these violations. The Commission listed the victims and sent its confidential investigatory information to the courts. The courts are required to investigate.

16. The Commission, in its list of recommended measures, included:

(a) Symbolic reparation, i.e. publicly restoring the dignity of the victims;

(b) Legal and administrative measures to solve such problems as the legal status of spouses of the "disappeared", inheritance; and

(c) Financial reparation including psychological and medical health care, financial support for education and exemption from mandatory conscription for the sons of victims.

17. The new law partially satisfies the State's obligation to redress human rights violations. The major problems with the new law are its limits regarding whom it covers. The law covers only those human rights violations resulting in death or presumed death, i.e. "disappearance". 4/

18. In conclusion, the new law is a step towards remedying relatives of human rights victims, but only those who have been killed or have "disappeared". The new law does nothing to remedy those who have survived human rights violations. So long as the Supreme Court and the 1978 Military Self Amnesty Law provide impunity to the perpetrators of these crimes if committed before 1978, justice will not prevail.

II. ARGENTINA

19. Following the October 1991 conclusion by the Inter-American Commission of Human Rights that Laws 23.221, Obediencia Debida (due obedience) and 23.492,

Punto Final (final point) violate the right to judicial protection and judicial guarantees under the American Convention and the American Declaration, the Argentinian National Congress passed Law 24.043. The new law, passed in January 1992, grants compensation to persons who, during the military dictatorship, were detained by military tribunals or were administratively detained by the National Executive Power.

20. The new law presents major problems regarding the extent of the compensation and who is covered. First, while economic compensation to human rights victims is a necessary means of remedying victims of human rights violations, it is but one of the State's many obligations.

21. Second, the law covers only those victims who have been detained. Thus, it fails to address all other human rights victims. All human rights victims and/or their families, where appropriate, have a right to compensation as well as an investigation, trial and punishment of the perpetrators of the violations. Economic compensation only partially satisfies the State's obligations and does not fully satisfy the victims.

III. URUGUAY

22. On 22 December 1986 Uruguay adopted a law (Ley de Caducidad de la Pretensión Punitiva del Estado, Ley 15.848). The law terminated the State's power to prosecute and punish military and police personnel responsible for human rights violations committed during the de facto military rule from June 1973 to March 1985. On 4 October 1991, the Inter-American Commission of Human Rights found that the law violates key provisions of the American Declaration and the American Convention. This was the first decision by an intergovernmental body to address directly the issue of laws granting impunity or amnesty to state officials violating human rights.

23. In 1986 Uruguay adopted its impunity law. As a result, criminal cases in civilian courts against military and police personnel, involving approximately 600 victims, were dismissed.

The case before the Inter-American Commission of Human Rights

24. The case before the Commission was filed against Uruguay by the relatives of the victims. Petitioners alleged that impunity has been granted by Law 15.848 to state agents who violated the non-derogable rights to life and human treatment. Petitioners focused on the effect Uruguay's impunity law has had on their cases. They argued that the impunity law has prevented an impartial and exhaustive investigation and prosecution of state agents for the violations of their human rights. Thus the law violates their right, guaranteed by both the American Declaration and Convention.

25. To this the Government of Uruguay responded that the law played an integral part in the national reconciliation process and that it was the result of a democratic decision. 5/ Thus, the State argued that the law does not violate the South American Convention nor Uruguay's other international legal obligations.

26. In its decision, the Commission stated that the effect of the impunity law was to terminate all actions currently before the court, thus leaving victims without internal legal means of judicial redress. The Commission concluded that Uruguay's amnesty "solution" directly conflicts with the rule of law.

27. The Commission stated that all society has the right to know the truth, and the circumstances of the crime. Accordingly, each State must provide the necessary means for the investigation and trial. The Commission thus found that the law violates the rights of victims to judicial guarantees.

28. Further, the Commission found that the Uruguayan Government has not fulfilled its obligation to guarantee respect of the rights (art. 8.1 of the Convention). The Commission found that the impunity law violates the Convention by failing to guarantee the rights to effective recourse before a court for acts violating fundamental rights (arts. 25.1 and 25.2).

29. The Commission found that by passing the law, the Uruguayan Government violated its duty under article 1.1 of the Convention to protect the rights and liberties recognized in the Convention. The law also violates the Government's obligation to investigate.

30. For the above reasons, on 4 October 1991, the Commission concluded that the impunity law (Ley 15.848) violates article XVIII (the right to justice) of the American Declaration and articles 1,8 and 25 of the American Convention. Accordingly, the Commission recommended that the Government of Uruguay grant the petitioning victims and/or their relatives just compensation for the violations suffered.

31. The International Commission of Jurists (ICJ) sees the Commission's decision as a step in the right direction, but it does not go far enough. The ICJ agrees with the Commission's analysis, finding the impunity law in violation of American international law.

32. Though the Commission's recommendation calls only for Uruguay to compensate the petitioners, the decision correctly recognizes that the impunity law fails to carry out Uruguay's international law responsibilities. Under international law, Uruguay must ensure a judicial, impartial and exhaustive investigation which determines if a crime has been committed and imposes sanctions for such crimes, and Uruguay must also compensate the victims.

33. The Uruguayan people have a right to have the truth made public; to have the perpetrators of human rights violations tried and punished; and for the victims and/or their families to be compensated for the suffering they have endured as a result of the crimes committed by agents of the State.

Notes

1/ Judgement, Inter-American Court of Human Rights, Series C. No. 4 (1988), para. 166.

2/ Ibid., para. 174.

3/ Supreme Decree No. 355 of 25 April 1990 established the National Commission for Truth and Reconciliation. The Commission's aim was to investigate thoroughly human rights violations committed by agents of the State and the violent actions performed by private individuals opposing the Pinochet regime.

4/ Law No. 19.055 does, however, allow the President of the Republic to grant pardons and amnesties to political prisoners charged under the Law of Terrorism. The President has exercised this power where possible.

5/ This argument presumably refers to the national referendum of 16 April 1989 in which the law was confirmed. Nevertheless, both the approval of the law and the referendum are unilateral actions of the State which cannot exempt Uruguay from its international responsibility.